IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 2673 OF 2006

Mr.K. Bala & Anr. ...Petitioners
V/s.
Harvir Singh & Anr. ...Respondents

Mr.P.G. Pravin for the Petitioners.
Mr.M.S. Mohite for Respondent No.1.
Mr.Y.M Nakhawa, APP for State.

CORAM : V.M. KANADE, J.

DATED : SEPTEMBER 10, 2007

P.C. :-

. Heard the learned Counsel for the petitioners and the learned Counsel for the respondent. Rule. Rule is made returnable forthwith by consent of parties.

2. The petitioner is the Power of Attorney holder of his sister of who is owner of Flat No.A-702, New Harvard Garden, C.H.S. Ltd., situated at Green Wood Complex, Thane (W), The petitioner has filed this writ petition under Article 227 of the Constitution of India being aggrieved by the order passed by the Magistrate dated 12th May, 2006 which is annexed at Exhibit-E.

3. By the said order, the learned Judicial

Magistrate, First Class, Thane, on an application filed by respondent No.2 - original complainant vide Misc.Application No.190/2006 was pleased to direct the police to seal the flat No.A/702 in the said society and also to seize the other articles and belongings in the said flat. The police pursuant to the said order which was passed by the learned Magistrate which was admittedly passed in the absence of the petitioner and without giving any notice to him, by panchanama dated 30th May, 2006 was pleased to seal the premises and also was pleased to take possession of all the articles which were kept on the terrace and after making an inventory of the said articles, police kept all these articles in the said flat.

4. The dispute between the parties pertains to the flat which is sealed by the police. It is the case of the petitioner that the flat, in question, was owned by his sister who is staying abroad and he is the Power of Attorney holder of his sister. It is the case of the petitioner that the petitioner had given the flat initially on humanitarian grounds to the respondent no.1

and later on, there was agreement executed between the parties to sell the said flat.

5. The complainant, on the other hand, states that he had paid part of the consideration and he was already in possession when the agreement was executed. It is his case that when he alongwith his family had gone to Utter Pradesh to meet some relatives, the petitioner herein had forcibly dispossessed and had put all the articles belonging to him on the terrace and after he came back, he noticed that he was dispossessed, he, therefore, filed a criminal complaint in the police station alleging that the petitioner herein had committed criminal trespass. He also filed application in the Court of the Magistrate under Section 105(c) and (d) and on the said application, the impugned order has been passed.

6. The learned Magistrate was pleased to pass the order on the application itself.

> "Perused application & record. In view of order below exh. 1 & considering valuable property,

documents & belongings, application granted and accordingly, Sr.P.I. Kapurbawdi Police Station directed to seize the alleged property mentioned in the application till investigation complete by IO and hence issue order accordingly.

Sign -
JMFC,
12.5.2006."

7. The learned Counsel for the petitioner submitted that such an order could not have been passed by the Magistrate while exercising his jurisdiction and power vested in him under Section 105(c)(1) and 105(d) of the Cr.P.C. He invited my attention to the agreement of sale in which it is specifically stated that the possession of the flat would be handed over to the respondent no.1 only if the entire consideration is paid and the cheques which were given by him are honoured. He submitted these cheques which are given by the respondent no.1 were dishonoured. He submitted that therefore, the respondent no.1 was not in possession of the property.

8. The learned Counsel for the respondent no.1 submits on the basis of documents compilation of which have been tendered on behalf of respondent no.1 that he

was in possession since 2004. He submits that therefore, the petitioner had no right to dispossess him forcibly. He submitted that the Magistrate was empowered to passed order under Section 105(c)(1) and 105(d) in order to ensure that the property is not damaged.

9. In my view, the impugned order passed by the Magistrate is liable to be set aside. Section 105(c)(a) and 105(d) read as under :-

> "**105-C. Assistance in relation to orders of attachment or forfeiture of property.-** (1) Where a Court in India has reasonable grounds to believe that any property obtained by any person is derived or obtained, directly or indirectly, by such person from the commission of an offence, it may make an order of attachment or forfeiture of such property, as it may deem fit under the provisions of Sections 105-D to 105-J (both inclusive).
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> **105-D. Identifying unlawfully acquired property.-** (1) The Court shall, under sub-section (1), or on receipt of a letter of request under sub-section (3) of Section 105-C, direct any police officer not below the rank of Sub-Inspector of Police to take all steps necessary for tracing and identifying such property.
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> (2) The steps referred to in sub-section (1) may

include any inquiry, investigation or survey in respect of any person, place, property, assets, documents, books of account in any bank or public financial institutions or any other relevant matters.

(3) Any inquiry, investigation or survey referred to in sub-section (2) shall be carried out by an officer mentioned in sub-section (1) in accordance with such directions issued by the said Court in this behalf."

10. Perusal of the aforesaid provision clearly indicates that the Magistrate had no power to pass the impugned order. In the event of any dispute between the parties, it is always open for the Civil Court to decide the issue of possession or if the complaint is filed under Section 145 and on the basis of the report, the Executive Magistrate can decide whether the person has been dispossessed or not, the Magistrate in such cases therefore, could not have passed the said order particularly when it is an admitted position that the petitioner is the Power of Attorney holder of the owner of the flat and under such circumstances, the impugned order could not have been passed without giving any notice to the petitioner herein. There is a complete non-application of mind on the part of the Magistrate in

passing the impugned order. The Magistrate, in my view, has passed an order in the most causal manner without giving any reason justifying his action of sealing the premises. The impugned order, therefore, cannot stand judicial scrutiny under any circumstances and is liable to be set aside. Writ petition is, accordingly, allowed. The impugned order is quashed and set aside.

11. The Investigating Officer is directed to remove the seal of the premises and as and by way of temporary measure, handover the possession of the premises to the petitioner herein forthwith.

12. The petitioner, however, is directed not to create any third party rights or transfer the said flat during the pendency of the civil suit.

13. The proceedings which are taken by both the parties before the Civil Court be disposed of immediately. Civil Judge, Senior Division, Thane, may decide the Civil Suit No.559/2006, as expeditiously as possible and in any case, within a period of six months.

The Civil Court also shall decide interim application, expeditiously, within four weeks.

14. It is made clear that Civil Court shall not be influenced by any observation made by this Court while deciding this writ petition and the Civil Court shall decide the issue of possession or dispossession on merits and in accordance with law. The Police shall handover all the articles which are belonging to the respondent no.1 herein and which can be seen from the panchanama which is directed by the police.

15. The petitioner also has filed a civil suit which is pending in the Court of CJSD bearing No.293/2006. Both these suits may be tagged together and may be heard and decided by the CJSD.

. With these directions, Writ petition is disposed of.

(V.M. KANADE, J.)